IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| PATRICK SMITH, | : | |
| Plaintiff, | : | CIVIL ACTION |
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| V. | : | |
| | : | |
| CITY OF PHILADELPHIA, | : | 2:00 CV 03623 |
| Defendant. | : | |

**MEMORANDUM AND ORDER**

DAVIS, J. September 23, 2002

## I. INTRODUCTION

On April 2, 2000, Patrick Smith ("Smith") filed suit against the City of Philadelphia ("the City") claiming that the City was liable under the Political State Tort Claims Act ("TCA"), 42 Pa. C.S.A. § 8541, for injuries sustained as a result of being attacked with a large knife by an off-duty Philadelphia police officer. In response to the City's Preliminary Objections, Smith amended his complaint on June 12, 2000 to allege a violation of his civil rights pursuant to 28 U.S.C. § 1983. After filing its Answer on June 26, 2000, the City removed the case to federal court on July 18, 2000 due to the added federal question. A Scheduling Order, which called for expedited discovery, was issued on October 20, 2000. This order was not followed by counsel. On November 8, 2001, the City filed a Motion for Summary Judgment, to which Smith

responded in opposition on December 3, 2001. The matter was transferred to this Court on May 23, 2002. In the Motion presently before the Court, the City seeks summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the federal civil rights and state tort claims. For the reasons given below, the City's Motion for Summary Judgment will be granted.

## II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Fed. R. Civ. P. 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence presented by the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the non-movant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

## III. FACTUAL BACKGROUND

On the night of December 11, 1997, Smith was hit upon the head with a large knife by an off-duty police officer employed by the City. Prior to the incident, Smith had been standing in front of his mother's house in Philadelphia with his cousin when he saw an unknown man, later revealed to be Police Officer Doray "Ray" Cooper ("Cooper"). Cooper exited a car and walked up the steps of the home where Smith lived most of the time with his girlfriend and her two children, one of whom was fathered by Smith.[1] As Cooper rang the doorbell, Smith approached and saw his girlfriend appear at the door holding their child. She let Cooper enter her home and Smith questioned her regarding Cooper's presence, including whether Cooper stayed with her on the occasions when Smith did not.

Although Smith's girlfriend advised him to return to his mother's house, Smith attempted to follow Cooper and his girlfriend into the home, at which point Cooper appeared from inside and hit Smith upon the head with a large knife which had been in a kitchen drawer. Smith was taken by ambulance to the Hospital of the University of Pennsylvania where he was treated for his injuries and discharged the same day. While Smith was still at the hospital, the police asked him if he was aware that the person attacking him was a police officer and Smith responded that he did not. For the first time Smith learned that his attacker was Philadelphia Police Officer Cooper.[2]

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[1] Philadelphia Police Department Investigation Interview Record, filed on December 16, 1997, Defendant's Motion for Summary Judgment, Exhibit "A."

[2] Although the Complaint sets forth a rendition of the facts with little detail, Smith's description of the facts made during his police investigation interview is entirely consistent with the factual narrative contained in the police reports. The Complaint, filed on April 12, 2000, simply avers "on or about December 11, 1997, the plaintiff was traversing in a careful, prudent and lawful manner in and around the area of 5804 Lansdowne Avenue, Philadelphia, PA. Suddenly, without warning, the City acting by its agent, servant, workman and/or employee, to wit, Philadelphia

## IV. DISCUSSION

A. Federal Civil Rights Claim Pursuant to 28 U.S.C. § 1983

Smith has not made out a *prima facie* case on his federal civil rights claim, pursuant to 28 U.S.C. § 1983 ("Section 1983"), sufficient to survive the City's Motion for Summary Judgment. To maintain a Section 1983 claim, a plaintiff must show that the defendant deprived him of a right or privilege secured by the Constitution or laws of the United states *while* acting under color of state law. Williams v. Borough of West Chester Pennsylvania, 891 F.2d 458, 464 (3d Cir. 1989); Hicks v. Feeney, 770 F.2d 375, 377 (3d Cir. 1985). Section 1983 is not a source of substantive rights but provides "a method for vindicating federal rights elsewhere conferred." Graham v. Connor, 490 U.S. 386, 393-94 (1989). Thus, Section 1983 does not give rise to "a right to be free of injury wherever the State may be characterized as the tortfeasor," but rather the plaintiff must demonstrate that he was deprived of a federally protected right. Paul v. Davis, 424 U.S. 693 (1976). The central issue in determining whether an individual has acted under color of state law is whether the alleged infringement of federal rights is "fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Accordingly, a finding by the Court that Cooper was acting under "color of state law" when he attacked Smith is necessary for Section 1983 liability to exist.

An action taken under the color of law is one taken under "pretense" of law, and therefore "acts of officers in the ambit of their personal pursuits are plainly excluded." Screws v. United States, 325 U.S. 91, 111 (1945). Accordingly, the critical inquiry is whether the purported

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Police Officer Ray Cooper struck the Plaintiff in his head with a very large knife". No other discussion of the factual events is present in the plaintiff's pleadings or in his response to the defendant's Summary Judgment Motion. Thus, although the factual presentations of the parties differ in detail, no genuine issue exists as to any material fact.

violation of a plaintiff's civil rights was committed by an officer engaged in police action and not private action. In making this determination, courts consider whether the actions under review were consistent with actions taken by a police officer.

The Third Circuit in Barna v. City of Perth Amboy, 42 F. 3d 809 (3d Cir. 1994), clarified the analysis to be applied to determine whether an off-duty police officer, is engaged in private action rather than police action. The nature of an officer's action is crucial to this determination and therefore officers' "purely private acts which [are] not furthered by any actual or purported state authority" are excluded. Barna at 816. In comparison, "off-duty police officers who purport to exercise official authority will generally be found to have acted under color of state law." Id. Objective indicia of such purported authority may include "flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations." Id.[3]; Halwani v. Galli, 2000 U.S. Dist. LEXIS 9684 (E.D. Pa. July 2000) (holding that even though the officer was on duty and in uniform, the incident under review constituted an argument based on the ongoing personal relationship of the parties, rather than any police action, and thus the officer was not acting under color of state law)[4]; Nonnemaker v. Ransom, 1999 U.S. Dist. LEXIS 8108, 4 (E.D. Pa. 1999) (holding that the off-duty officer's acts of telling the plaintiff that he was a police officer and demanding that the plaintiff give up his gun with the implication that he was

[3] In Barna, the Third Circuit found that plain-clothed officers were engaged in a private dispute inconsistent with actions taken by police officers when, during the course of a fight between one of the defendants and his brother-in-law, plaintiff, another defendant, used his police-issued nightstick to put defendant into a choke-hold.

[4] The court in Halwani was of the opinion that it was "obvious" that the officer was engaged in private action when he entered plaintiff's store, threatened his life, told him to stop calling his house and trying to collect money owed to plaintiff even though defendant was in uniform.

attempting to preserve the peace were taken "with the roguish purpose of disarming him . . . to facilitate the battery and assault of that individual . . . cannot be said to be consistent with actions taken by a police officer.")[5]

In the case before the Court, the incident between Smith and Cooper was a purely private dispute and the record fails to reveal any evidence that it occurred "under color of state law." The parties do not dispute that Smith did not know that his attacker was a police officer and that Police Officer Cooper did not identify himself as an officer, utilize his employment as a law enforcement officer to exercise authority over Smith or to direct him to comply with the dictates of the law. Rather, Cooper attacked Smith – whom he knew was also romantically involved with his girlfriend – as Smith was attempting to follow Cooper and the woman in question into her home. These uncontroverted facts plainly establish that Cooper was not acting under color of state law when he assaulted Smith. As Cooper was not acting under color of state law, Smith's claim that the City of Philadelphia had a "custom" or "policy" of using excessive force giving rise to municipal liability under 42 U.S.C. § 1983 must be denied.[6]

Even assuming arguendo that Cooper was acting in his official capacity as a police officer, one incident involving the use of excessive force by a police officer does not render the City of Philadelphia liable for an infringement of constitutional rights arising out of a purported

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[5] Defendant Ransom and his friends, who were intoxicated, pushed their way into the plaintiff's hotel room and tried to initiate a fight. When certain defendants informed Nonnemaker and his friends that they were guards at Graterford State Prison, Nonnemaker reached for his gun on the dresser and warned the group to leave immediately. In response, Ransom informed Nonnemaker that he was an off-duty police officer and told Nonnemaker to surrender his gun. Nonnemaker demanded to see police identification. Ransom did not produce identification but promised to remove the group if Nonnemaker gave him his gun. Nonnemaker complied and defendants proceeded to beat Nonnemaker.

[6] In fact, the City of Philadelphia took immediate action against Cooper, ultimately dismissing him and filing criminal charges against him.

municipal "custom" or "policy" of deliberate indifference to the constitutional rights of citizens, and to Smith's constitutional rights in particular. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (reversing a Court of Appeals ruling which upheld a trial court's jury instructions that "the jury could infer from a *single,* unusually excessive use of force that it was attributable to inadequate training or supervision amounting to deliberate indifference or gross negligence on the part of city officials in charge, notwithstanding that plaintiff introduced independent evidence of inadequate training" [emphasis added]).[7]

Furthermore, the Supreme Court has enunciated four guiding principles to determine municipal liability:

> municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." Second, only those municipal officials who have 'final policymaking authority" may by their actions subject the government to § 1983 liability. Third, whether a particular official has "final policymaking authority" is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.

St. Louis v. Praprotnik, 485 U.S. 112, 118 (1988), *citing* Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986).

Accordingly, such a "custom" or "policy" would also have to be the catalyst or "moving force" behind Smith's injuries. Board of Commissioners of Bryan County v. Brown, 520 U.S.

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[7] In Tuttle, plaintiff's decedent was killed by a policeman who was responding to a call from a bar regarding a robbery in progress. The inexperienced policeman interpreted Tuttle's actions as highly suspicious of possessing a weapon and attempting to reach it. When Tuttle continued to attempt to twist out of the officer's hold and bent down to his boots, the officer shot him. At trial, testimony was presented that the officer believed he had not received sufficient training in responding to armed robberies, that in fact he had received about 24 minutes worth of training, and that such was the level of training at the Oklahoma City Police Department. The Supreme Court did not find that the individual officer's conduct could be attributed to a policy of inadequate training by the city.

397 (1997). Smith alleges that there is a municipal "custom" or "policy" of deliberate indifference on the part of the Police Department to citizens of Philadelphia, yet none of his allegations address the legal requirements for finding municipal liability. Not one document, exhibit, affidavit or statement of a competent witness is attached to Plaintiff's Brief in Opposition to Summary Judgment. The record simply does not contain evidence that would permit a fact finder to conclude that the City of Philadelphia sanctioned Cooper's behavior. On the contrary, the inverse inference flows from the City's prompt dismissal of Cooper from the Police Department. Additionally, Smith fails to establish a connection between such "custom" or "policy" and the injuries he sustained. No facts are presented from which any reasonable fact finder could conclude that a City policy was the catalyst for Cooper's assault on Smith. For these reasons, Smith's federal civil rights claim pursuant to 28 U.S.C. § 1983 must fail.

B. State Tort Claims Under the Political Subdivision Tort Claims Act, 42 Pa. C. S.A. § 8541 *et seq.*

Smith's claims under the Political Subdivision Tort Claims Act, 42 Pa. C. S. A. §8541 *et seq.* do not survive summary judgment. Under the TCA, "[n]o local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." The pleadings and exhibits of record permit only one reasonable conclusion: because Cooper was off-duty and acting as a private citizen and not within the scope of his employment, his actions are not the City's responsibility.

Even if Smith's claims were cognizable under the TCA, Cooper's actions would have to

fall under one of eight applicable and strictly construed exceptions to governmental immunity.[8] Raie v. City of Philadelphia, 2001 U.S. Dist. LEXIS 11267, 19 (E.D. Pa. 2001). They do not. Accordingly, Smith's state tort claims must fail.

Lastly, the Court will briefly address Smith's response to the City's Motion for Summary Judgment by first noting that although this case is in federal court, Smith cites neither federal cases nor the Federal Rules of Civil Procedure in support of his arguments. In error, Smith relies on Pennsylvania Rule of Civil Procedure 1035.2[9] when the operational procedural rule in federal court is Federal Rule of Civil Procedure 56(b), regarding summary judgment, which states:

> For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

While the Court appreciates that for reasons unknown discovery may not have been completed in this case, there is no requirement in a federal proceeding that all discovery be complete before a party moves for summary judgment.

Moreover, Smith has failed to follow the requirements of Federal Rules of Civil

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[8] The exceptions, or acts which may impose liability, are: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa. C. S. A. § 8542(b)(1)-(8).

[9] Pa. R. Civ. P. 1035.2 states:
After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Procedure 56(e)[10] and (f) for opposing a motion for summary judgment. Rule 56(e) permits the adverse or nonmoving party to file affidavits that would support its pleadings beyond mere allegations of fact. If the party cannot provide such affidavits but gives the court legitimate reasons for this failure, Rule 56(f) allows the court to take other steps that would preserve the case; either refusing the motion for summary judgment, ordering a continuance in order to obtain the affidavits or obtain discovery, or entering another just order.

In his Response to the Motion for Summary Judgment, Smith has not pointed to facts of record or assertions in his complaint sufficient to allow his claims to survive Defendant's Motion for Summary Judgment. He has not filed affidavits that would affirmatively support his complaint in opposition to the substance of the Motion as required by the Rules of Civil Procedure. Plaintiff's position is tantamount to a simple denial of the substance of the Summary Judgment Motion and does not rise to the minimal standard of offering a "scintilla of evidence." Smith has failed to present any authority that all discovery must be complete before the defendant in a federal matter may move for summary judgment.[11]

In conclusion, the plaintiff in the instant matter has not presented evidence, affidavits or legal authority which would permit a reasonable fact finder to rule in his favor on the merits of this action.

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[10] Rule 56 (e) states in part:
When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[11] Smith's second argument in opposition to Defendant's Motion for Summary Judgment concerning the necessity for oral testimony also fails. Plaintiff relies on three cases that are inapposite because they rely on Pennsylvania state, and not federal, procedural rules and had advanced to the trial stage.

The City's Motion for Summary Judgment is granted. An Order follows.